

May 30, 2018

VIA FOIA online

Regional Freedom of Information Officer
U.S. EPA, Region 5
77 West Jackson Boulevard (MI-9J)
Chicago, IL 60604-3590

RE: Freedom of Information Act ("FOIA") Request for all records, including communications, between EPA and the City of Milwaukee regarding lead from Jan. 1, 2010, through the date the request is fulfilled

Dear FOIA Officer:

In accordance with 5 U.S.C. § 552, Midwest Environmental Advocates ("MEA") requests a copy of all records¹, including communications, between the City of Milwaukee, WI and/or Milwaukee Water Works and the Environmental Protection Agency ("EPA") regarding lead services lines or lead levels in drinking water. Please include in your response all records, including communications, occurring from Jan. 1, 2010, through the date the request is fulfilled.

The Supreme Court has stated that FOIA establishes a "strong presumption in favor of disclosure" of requested information, and that the government bears the burden of substantiating why information may not be released under FOIA's limited exemptions. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA as recently as 2007, stating that government remains accessible to the American people and "is always based not upon the 'need to know' but upon the fundamental 'right to know.'" OPEN Gov't Act of 2007, Pub. L. No. 110-175, § 2(6), 121 Stat. 2524, 2525. If the EPA invokes a FOIA exemption to deny all or part of this request, "[t]he description and explanation... offer[ed] should reveal as much detail as possible as to the nature of the document," in order to provide "a realistic opportunity to challenge the agency's decision." *Oglesby v. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Pursuant to the holding of *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), please include a detailed ledger including:

1. Basic factual material about each withheld communication, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific statutory exemption(s) under which the communication (or portion thereof) was

¹ This request defines "records" broadly to include all documents, books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics. "Documents," as used herein, refers to paper documents and/or electronically stored information, including writings, correspondence, records of phone conversations, telephone recordings, voice mails, emails, attachments, letters, memoranda messages, instant messages, G-chats, text messages, chats, notes, meeting minutes, drawings, graphs, charts, sound recordings, images, and other data or data compilations, stored in any medium.

withheld, a full explanation of how each exemption applies to the withheld communication, and any interest(s) that would be harmed by release. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If your position is that a document contains exempt segments that are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. See *Mead Data Cent. v. Dep't of Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Fee Waiver Requested

I hereby request that the EPA waive all fees associated with this request. FOIA requires the federal government to furnish documents to public interest groups free of charge, or at a reduced rate, "if disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Such disclosure is in the public interest if "it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." *Id.* FOIA's fee waiver requirement is to be "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

While a FOIA requester bears the initial burden of making a prima facie showing of entitlement to a fee waiver, *Monaghan v. FBI*, 506 F. App'x 596, 597 (9th Cir. 2013), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, and need only be "reasonably specific and non-conclusory." *Rossotti*, 326 F.3d at 1310 (citing *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (per curiam)). A requester meets this burden in situations in which "[t]hey identified why they wanted the [requested information], what they intended to do with it, [and] to whom they planned on distributing it. . ." *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9th Cir. 1997). Whether a document will ultimately be "disclosed is not properly part of the initial inquiry into whether a fee waiver is applicable." *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009).

The EPA typically looks to six (6) factors to determine whether the disclosure of the information is likely to contribute to public understanding of the operations and activities of the government. See 40 C.F.R. § 2.107(l)(2)-(3). Each factor is discussed below.

(2)(i): The subject of the request concerns identifiable operations and activities of the federal government

The subject of this request concerns any EPA communications with the City of Milwaukee regarding lead service lines, their repair or replacement, and the presence of lead in drinking water. EPA is statutorily authorized to implement the Safe Drinking Water Act ("SDWA"), which it does through the Lead and Copper Rule and other agency regulations. This authority often requires EPA to communicate and consult with state and local agencies in overseeing local implementation of the SDWA and EPA regulations.

(2)(ii): The disclosure is "likely to contribute" to an understanding of government operations or activities

The requested records will elucidate the ongoing communications between city and federal authorities regarding lead water contamination in Milwaukee. As noted above, there is particular interest in understanding how governmental agencies are handling issues of lead contamination in drinking water. Access to these records and communications will increase understanding of EPA's and Milwaukee's operations and activities in these areas.

(2)(iii): The disclosure of the requested information will contribute to "public understanding"

The disclosure of the requested communications will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester² because the requestor has the intent, expertise, and means to distill and disseminate the requested information to the public. It is important to note "proof of the ability to disseminate the released information to a broad cross-section of the public is not required," *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004), and the statute has no requirement of a minimum number of dissemination methods. *Cause of Action v. FTC*, 799 F.3d 1108, 1116-17 (D.C. Cir. 2015).

MEA is an organization that has considerable legal, policy, and technical expertise working on water pollution issues over its 19-year history. Along with several partner organizations and citizens, MEA has identified drinking water contamination as an area of concern, and MEA is committed to leveraging its expertise to strengthen environmental controls and further enforcement of existing law governing the protection of public health. MEA has worked collaboratively in the past to educate the public of the environmental and health impacts of myriad water pollution issues, and the need for effective enforcement and implementation of applicable state and federal Safe Drinking Water requirements.

² 40 C.F.R. § 2.107(l)(2)(iii); *Cause of Action v. FTC*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (quoting *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, at 815 (2d Cir. 1994)) "[T]he relevant inquiry...is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"

MEA has the legal, policy, and technical experts on staff, with broad experience in water quality issues—and the Safe Drinking Water Act particularly—who will distill the contents of the communications and provide that information to the public. MEA maintains a list of activists, concerned citizens, donors, and members who are themselves interested in learning more about water pollution issues. Further, MEA has 1600 subscribers to our e-newsletter, nearly 2000 Twitter followers, over 4000 Facebook followers, and a website with a regularly-updated blog. *See, e.g.*, <http://midwestadvocates.org/news-events/news/meteor-timber-wetlands-destruction-proposal-up-for-public-comment/>.

The information gleaned from the requested records, once analyzed and distilled, will be disseminated through the above means to interested individuals and organizations, as well through press releases and public presentations. We regularly share records received through open records requests with the media when they involve issues of significant public interest. We also plan to share this information with specific organizations in the Milwaukee area who work on these issues.

Additionally, MEA has a page on its website to post responses to record requests such as this FOIA request to the EPA. That information will be available to the public through the Google search function on our website. *See* <http://midwestadvocates.org/opengovernment>.

(2)(iv): The contribution to public understanding will be "significant" and the level of public understanding will increase as a result of disclosure

There is currently great public interest in and concern about lead in drinking water, with well-publicized examples such as Flint, MI and now Milwaukee, WI. The requested records will greatly elucidate how the present lead levels in Milwaukee's drinking water arose. Not only will these records thus increase the public's understanding regarding lead in Milwaukee's drinking water, but will also increase understanding of how city, state, and federal government independently and collaboratively oversee lead levels in drinking water.

(3)(i) & (3)(ii): Disclosure of the information is not primarily in the commercial interest of the requester

The D.C. Circuit in 2015 stated "since the 1986 amendments, it no longer matters whether the information will also (or even primarily) benefit the requester. Nor does it matter whether the requester made the request for the *purpose* of benefiting itself. The statutory criterion focuses only on the likely *effect* of the information disclosure." *Cause of Action*, 799 F.3d at 1118. As a non-profit, non-partisan organization, MEA has no commercial interest in the communications requested herein. We have a public interest mission to ensure clean water, air, land, and government for this generation and the next. The ultimate effect of disclosing the requested records and communications to MEA will be to better inform interested members of the public about lead service lines and drinking water in Milwaukee, and EPA's operations and activities related to those topics.

Please contact me at 608-251-5047 ext. 5, or via email at sgeers@midwestadvocates.org, if you need to discuss any aspect of my request. I anticipate receiving your response to my request, including any claimed exemptions³, within twenty days, as required under 5 U.S.C. § 552(a)(6)(A).

Thank you for your consideration of this request.

Sincerely,

/s/

Sarah Geers
Staff Attorney
Midwest Environmental Advocates, Inc.

³ See *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 182-183 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA)